111-523

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 327.

MARY E. BARRETT, Appellant,

vs.

CHARLES D. FAILING and XARIFFA J. FAILING, Appellees.

BRIEF AND ARGUMENT FOR APPELLEES.

J. N. DOLPH,
For Appellees.

Thomas McGill & Co., Law Printers, Washington, D. C.

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This is an appeal from a decree of the Circuit Court of the United States for the district of Oregon.

STATEMENT OF THE CASE.

This suit was brought by the appellant for partition of lots 7 and 8 in block 63 in the city of Portland, Oregon, between herself and the appellees, for an accounting for the rents and profits of the undivided third of said real property claimed by her, and to have such rents and profits, when ascertained, declared to be a lien upon the remaining two-thirds of said real property.

A demurrer to the original bill was sustained, and an amended bill filed by leave of court.

The allegations in the amended bill are, in substance, that on September 25th, 1866, the appellant, who was, and for more than two years prior thereto had been, the wife of one Charles Barrett, and who was then a resident and citi-

zen of the State of California, commenced a suit in a court of that State to obtain a divorce from her said husband, then a resident and citizen of Oregon, and on April 1st, 1870, obtained a decree therein, dissolving the bonds of marriage between herself and husband; that at the date of the commencement of said suit said Charles Barrett was the owner of lots 7 and 8 in block 63 in the city of Portland, Oregon; and that on or about February 4, 1868, he conveyed said premises to his daughter, the defendant, Xariffa J. Failing, with intent to prevent the appellant from acquiring any right in the premises by said decree. That at the commencement of said suit for divorce she did not know that the said Barrett was the owner of said premises, and that he died shortly after the decree of divorce was obtained; that by the laws of the State of Oregon, and under and by virtue of the said decree of divorce, and as the effect thereof, she became and was entitled to the one-third of the property so conveyed to the said Xariffa Jane; that said Xariffa has been in possession of said premises for the past six years, and receives the rent and profits thereof.

To the amended bill the defendants filed a general demurrer for want of equity, which was sustained by the court and the bill dismissed.

The appellant assigns for error:

"That the Circuit Court committed error in sustaining defendants' demurrer and in rendering the decree dismissing the bill for want of equity. Said decree is erroneous in that it is based on the proposition that the same rule of law affecting title to realty resulting from a divorce in this State, does apply in case of a divorce obtained by a citizen of the State of California, in the courts of the latter State, on full jurisdiction."

The Questions Stated.

Section 495 of the Oregon Code of Civil Procedure is as follows:

"Whenever a marriage shall be declared void or dissolved, the party at whose prayer such decree shall be made shall in all cases be entitled to the one undivided one-third part in his or her individual right in fee, of the whole of the real estate owned by the other at the time of such decree, in addition to the further decree for maintenance provided for in section 497 of this act; and it shall be the duty of the court in all such cases to enter a decree in accordance with this provision."

This section was amended as it now stands on December 20th, 1865.

The questions to be considered are—

(1) Whether said section, upon the granting of a decree of a court declaring a marriage void or dissolved, transfers to, or vests in, the prevailing party in the suit the title in fee-simple of the one-third of the real property of the other party, when such decree is silent as to the disposition of the real property of the parties; or whether the section in question gives the right only to the prevailing party, upon appropriate allegations and proofs in such suit, to have a decree for the one-third part of the property of the other party; and

(2) Whether the section in question is a general rule of property of universal application, like the statute of descent, or is only a rule of civil procedure, and its operation confined to cases in which a decree of divorce is given under the provisions of the Oregon code, and in the Oregon courts.

Points and Authorities.

First. *The rule is settled by a series of decisions of this court, that the courts of the United States, in passing upon the statutes of a State, conform to the settled construction of them by the highest State court.* (Morris *v.* National Bank, 104 U. S., 625; Fairfield County *v.* Gallatin, 100 U. S., 47; Perkins *v.* Town of South Ottawa, 94 U. S., 260; Kibler *v.* Ditto *et al.*, 93

U. S., 674; Tioga R. R. Co. *v.* Blossburgh and Corning R. R., 20 Wall., 137; Walker *v.* State Harbor Commissioners, 17 Wall., 648; Nesmith *v.* Shelden, 7 How., 812; Polk's Lessee *v.* Wendell, 9 Cranch, 87.)

So far, therefore, as the statute in question has received a judicial construction by the Supreme Court of Oregon, this court will follow that construction.

SECOND. *Where the complaint and decree in a suit for divorce in the Oregon courts are silent as to property, the party obtaining the divorce acquires no right to the property of the other under the section in question, and such is the settled construction of the statute by the Supreme Court of that State.*

The brief of appellant's counsel contains the following statement:

"It is admitted and settled by this Circuit Court, as well as by the Supreme Court of Oregon, that it is a rule of property in this State that the prevailing party, on the dissolution of the marriage by divorce decree in our courts, at once, by virtue of the happening of the condition precedent, to wit, dissolution of the marriage by decree, obtains a legal title to the third, whether the land is mentioned in the pleadings or not."

This statement is not correct; but, on the contrary, the settled construction of this statute by the Supreme Court of Oregon is directly the opposite. That court, in the case of Bamford *v.* Bamford, 4 Oregon, 30, held that where the complaint and decree in a suit for divorce are silent as to the property of the defendant, the party obtaining the divorce acquires no right in the property of the other. In that case the plaintiff, having previously obtained a decree of divorce, brought a suit to recover from her former husband and his grantee certain real property, claiming a right thereto under the statute in question.

The court, opinion by Upton, J., said:

"The principal questions presented in this case arise from the omission of the plaintiff to present the facts in the suit for divorce, and to ask in that suit for the relief now demanded.

"Section 495 of the Code, as amended in 1865, is as follows:

"'Whenever a marriage shall be declared void or dissolved, the party at whose prayer such decree shall be made shall in all cases be entitled to the one undivided one-third part in his or her individual right, in fee, of the whole of the real estate owned by the other at the time of such decree, in addition to the further decree for maintenance provided for in section 497 of this act; and it shall be the duty of the court in all such cases to enter a decree in accordance with this provision.'

"The provision is comparatively new, and has not previously been before this court for construction. It is claimed by the appellant that the last clause of this section may be complied with in any case, whether the complaint states facts in regard to property or not, by inserting in the decree a clause, general in its character, to the effect that the prevailing party is entitled to one undivided third part of the real property owned by the other at the time of the decree. That it is, therefore, no longer necessary to state in the complaint what lands the defendant owns, or that the defendant owns real estate, the court being in duty bound to insert such clause in regard to real property in every decree by which 'a marriage is dissolved or declared void.' And that, since equity will treat that as done which ought to have been done upon the rendition of the decree, the party at whose prayer it is granted becomes entitled, if not in law at least in equity, to one-third the real property of the wrong-doer.

"I cannot think this was the intention of the Legislature, and I am unable to agree with the plaintiff's counsel in his attempt to deduce that conclusion from the last clause of the section. If that clause had been omitted, the construction contended for would be less difficult to maintain. I think this provision as to the duty of the court was intended to prevent such construction, and was added for the purpose of preventing uncertainty and inconvenience to the public, which would be likely to result from a mode

of adjudication that would leave such indefiniteness in a record affecting the title to real property. If it was the design that granting a divorce should, in every case, have the effect to transfer one-third the real estate of the party in fault, without specifying particular parcels, there would be no necessity for requiring the court to enter anything in the decree on that subject. The desired result would be produced by the law and not by the formal words entered in the decree. If that is the construction, the last provision may be stricken out without altering the effect of the statute. In an ordinary action, a party becomes 'entitled,' and it is 'the duty of the court in all such cases to enter' a judgment for the relief to which the party becomes entitled. But if the party permits a judgment which does not afford all the relief he was entitled to claim in the action to become final, the party suffers by the omission; and a court can only grant such relief as is warranted by the facts stated in the pleadings. Since in a divorce suit the court is required to enter a decree for the property, it does not seem consistent to hold that a party obtains property by the suit that is not mentioned in the decree.

"The statute, before the amendment, did not provide for transferring real property by means of the decree, to the prevailing party, in fee; and it seems to be the leading object of the amendment to provide for making such transfer. As the decree is to have the effect to transfer real estate from one person to another, and is to be one of the muniments of title from its entry, it seems entirely reasonable that it or the judgment-roll, of which it forms a part, should contain a description of the land thus transferred. And this is necessary if we would make the record in this class of cases analogous to records made in other suits affecting the title to real estate. I cannot doubt but that it was the intention of the Legislature, in making it the duty of the court 'to enter a decree in accordance with this provision,' to require as great degree of certainty to be expressed in the record in regard to the particular parcels of property thus transferred as is required in ordinary conveyances. The object of the section as amended is to enable a party to obtain certain rights through the medium of a court.

"To enable the court to act judicially on the subject of

property, it must appear in the complaint that the party has property; otherwise, there being nothing alleged, there is nothing to determine in respect to property, and nothing before the court upon which to base a decree in this particular. If nothing is stated concerning property, or if, as is frequently the case, for the purpose of affecting the subject of custody of children, it is alleged in the complaint that the defendant has no property, (it being in fact true,) it can hardly be deemed a case within this section. Certainly, in the latter case, the construction contended for would require the court to decree concerning that which does not exist, in contravention of the maxim that the law does not require a vain thing.

"*If these views are correct, the plaintiff has not acquired either a legal or equitable right to the property by the decree of divorce.*

"The authorities cited to show that alimony is not always settled at the time the divorce is decreed, do not go to the extent that is claimed in this case. None of them go further than that the court may first pass upon the question of granting or denying the divorce, and afterwards, in the same suit, investigate and determine the issues concerning property. *The present proceeding must be treated as an original suit; the decree in the suit for divorce having become final, cannot be disturbed, nor can any further proceedings be had in that suit, unless by a suit in the nature of a bill of review.* The facts stated in this complaint do not authorize the court to review that decree. It is not shown that the alleged fraud has been discovered since the trial of the divorce suit, nor that the plaintiff has discovered proof since that time. The plaintiff should have shown some sufficient excuse for not claiming the property at that time. When one seeks to open a judgment or decree, it should be shown by a statement of facts that the party applying is without fault, or that the neglect is excusable."

The next case decided by the Supreme Court of Oregon, in which the construction of the statute in question was involved, was the case of Wetmore *v.* Wetmore, 5 Oregon, 469.

The decision in that case was entirely in harmony with the previous decision of the court in Bamford *v.* Bamford,

4 Oregon, 30, and with that of Hall *v.* Hall, 9 Or., 452, in which the doctrine of Bamford *v.* Bamford is reaffirmed after mature consideration of the arguments presented by the district judge, in 6 Sawyer, 474.

That case was a suit in equity brought by Mary E. Wetmore against her husband, W. C. Wetmore, to obtain a divorce.

The legal title to certain property being in J. P. O. Lownsdale, as trustee for said W. C. Wetmore, he was also made defendant. The plaintiff alleged in her complaint that her husband, W. C. Wetmore, had induced her to mortgage certain real property belonging to her by which he secured money with which he purchased a lot of land in East Portland, and that in order to prevent her marital rights from attaching thereto he conveyed said lot to other parties, and that at the time of the commencement of the suit the title thereto was vested in Lownsdale, and in her prayer for relief she asked that the title to said lot inure to her and for general relief. The points decided by the court in the case sufficiently appear from the syllabus of the case, which is as follows:

DIVORCE—REAL ESTATE—HOW AFFECTED BY.

Whenever a marriage contract shall be dissolved, the party at whose prayer such decree is obtained is entitled peremptorily (under sec. 495 Civil Code) to the undivided one-third part of all the real estate shown to be owned by the other party at the time such decree was made.

In all such cases it is the peremptory duty of the court to so decree.

THIRD PARTIES—WHEN MADE DEFENDANTS IN DIVORCE SUITS.

When a husband conveys the bare legal title to a third party in trust for his use to prevent the marital rights of the wife from attaching thereto, such third party is a proper party to the proceeding.

In the case of Hall *v.* Hall, 9 Oregon, p. 452, which was a suit for divorce, the Supreme Court passed upon the same

question and reaffirmed the decision and acknowledged the authority of the case of Bamford *v.* Bamford.

The court, Judge Watson delivering the opinion, said:

"The Circuit Court, after granting the divorce to the respondent, together with the custody of the said minor child, proceeded to enter a decree in her favor, in general terms, for the undivided one-third of all the real property then owned by the appellant, under section 498 of the code. There was no allegation in the complaint or in any of the pleadings as to the existence of such property, nor any claim for such relief. Nor does the decree find that appellant owned any such property, or describe any such. The appellant claims that this was error.

"That it is in conflict with the views of this court in Bamford *v.* Bamford, 4 Oregon, 30, there can be no doubt; but it is supported by the opinion of Judge Deady in Barrett *v.* Failing, decided June 27, 1880, in the U. S. Circuit Court for Oregon. He did not decide the point, however; nor was it decided in Wetmore *v.* Wetmore, determined in this court subsequent to the decision in Bamford *v.* Bamford, *supra*, and reported in 5 Oregon, 469, which was cited as sustaining the same view.

"*After as thorough an examination as we have been able to give the subject, we are not satisfied that the principles enunciated in Bamford* v. *Bamford are incorrect,* and we feel constrained to acknowledge its authority as decisive upon the question before us.

"The decree, so far as it attempts to affect the real property of the appellant, is reversed, but in all else affirmed; each party to pay his or her own costs on appeal."

The principles enunciated in Bamford *v.* Bamford, here declared by the court to be correct, as stated in the syllabus of the case, are as follows:

(1.) *In a suit for divorce where the complaint contains no allegations concerning property, and the decree contains nothing on the subject, the party at whose prayer the divorce is granted does not acquire either a legal or equitable right to the property of the adverse party by the decree.*

(2.) *When real property is transferred from one party to*

another by a decree granting a divorce, the judgment-roll should contain a description of the land transferred.

(3.) *Although a court may first pass upon the question of granting or denying the divorce, and afterwards investigate and determine the issues concerning property, the subsequent investigation must be had in the same suit. The decree of divorce having become final, cannot be disturbed unless by a suit in the nature of a bill of review.*" * * *

The court below, in the case at bar, reviewing that case, said:

"In Bamford *v.* Bamford, 4 Or., 30, it was held that where the complaint and decree in a suit for divorce are silent as to the property of the defendant, the party obtaining the divorce acquires no right in the property of the other."

The case of Weiss *v.* Bethell, 8 Or., 522, is cited in the brief of counsel for appellant to sustain the proposition contended for by them, viz.: that when a marriage is declared dissolved by an Oregon court, the title to the one-third part of the real property of the party in fault passes to the prevailing party by operation of law, and without any mention of the land in the pleadings or decree.

If such a proposition had been decided in that case it would be sufficient to say that in the later case of Hall *v.* Hall, *supra*, the same court reaffirmed the principles enunciated in Bamford *v.* Bamford, *supra*, one of which, as has been hereinbefore shown, is that "where the complaint and decree in a suit for divorce are silent as to the property of the defendant, the party obtaining the divorce acquires no right in the property of the other." (See Barrett *v.* Failing, 6 Sawyer, 475.)

But the decision in that case is not as it is claimed to be by appellant's counsel. That case was a suit in the nature of a bill of review. It was commenced in the Circuit Court for Jackson county, the court in which the decree of divorce sought to be reviewed was rendered, and

afterwards transferred by an order of the court, and upon the stipulation of the parties, to the Circuit Court for Benton county, in which county certain lands were situated in which the plaintiff claimed that she was entitled to be decreed a one-third interest under said section 495. The court affirmed the judgment of the court below, sustaining demurrers to the amended complaint, for want of equity and for laches.

It appears to have been contended upon the argument of the demurrer of certain defendants who were made parties after the suit was transferred to Benton county, and therefore were not bound by the stipulation to transfer the cause, that the suit, because it was a suit in the nature of a bill of review, should have been tried in the Circuit Court for Jackson county, where the decree of divorce was rendered, and that the Circuit Court of Benton county had no juridiction of the subject-matter of the suit. The character of the suit having been thus incidentally drawn in question, apparently without much consideration of the subject, the court said:

"Conceding, *for the sake of argument*, that the plaintiff had *a right to* an undivided one-third of the real estate described in her complaint, upon obtaining her decree of divorce, June 13, 1866, *which did not vest in her at that time* by reason of *an omission in that decree*, it does not follow that she must get that decree opened and modified or extended in order to obtain the title in fee to such part. On the contrary, she could bring an original and independent suit in the Circuit Court in the county where the land is situated to enforce her right to the same, and she could not properly commence it anywhere else." (Godey *v.* Godey, 39 Cal., 161; Whetstone *v.* Coffee, 48 Tex., 369; Civil Code, sections 376, 383, sub. 3.)

So far from this decision sustaining the proposition contended for by appellant's counsel, it is in effect a statement that if the plaintiff had a right to the one-third of the real estate in controversy in that suit at the time the decree of

divorce was rendered, no interest in such real estate vested in her by reason of the opinion in the decree.

The case shows that the parties to the suit and the court considered that the title to the one-third of the lands, conceding that the plaintiff had a right to such third, could be vested in her only by a decree of the court.

By the Oregon Code, section 377, bills of review are abolished, but a decree in equity may be impeached and set aside, suspended, avoided, or carried into execution by an *original suit.*

The suit, therefore, of Weiss *v.* Bethell was an "original" suit, but it was at the same time a suit in the nature of a bill of review of the former decree of divorce between the plaintiff and her husband. And if the court intended to decide that an original suit in any other sense could be maintained by the plaintiff in that suit for the purpose of asserting her supposed right to the lands in controversy, the decision, to that extent, was in conflict with the decision of the case of Bamford *v.* Bamford, *supra*, and was overruled by the decision in the later case of Hall *v.* Hall, *supra.*

The cases cited by the court are not in conflict with the principles enunciated in Bamford *v.* Bamford.

By the laws of Texas and of California the courts of those States are authorized and directed, upon decreeing a dissolution of marriage, to partition the community property between the husband and wife. The cases cited from those States only decide that when a divorce is decreed by the courts of those States, and the community property is not partitioned in the suit for divorce, partition of such property may be subsequently made in another suit brought for that purpose. The reason given is that the rights of the husband and wife to the community property accrue before the decree of divorce is rendered, and are not divested or impaired by a decree which does not attempt to dispose of such property.

In DeGodey *v.* Godey, 39 Cal., 161, the court said:

"Under the provisions of the statute, property which is acquired during the marriage, unless acquired by gift, bequest, devise, or descent, is common property. It belongs to the matrimonial community, and not less to the wife than to the husband. It is true that the interest of the wife therein pending the marriage has been termed a 'mere expectancy.' (Van Maren *v.* Johnson, 15 Cal., 311.) But while, perhaps, no other technical designation would so nearly define its character, it is at the same time an interest so vested in her as that husband cannot deprive her of it by his will. (Beard *v.* Knox, 5 Cal., 256.) Nor voluntarily alienate it for the mere purpose of divesting her of her claims to it. (Smith *v.* Smith, 12 Cal., 226.) The theory upon which the right of a wife is founded (as we said in Galland *v.* Galland, 38 Cal., 265) is that the common property was acquired by the joint efforts of the husband and wife, and should be divided between them if the marriage tie is dissolved either by the death of the husband or by the decree of the court, etc. Her mere right in the community property is as well defined and ascertained in contemplation of law even during the marriage as that of the husband. It is true that the law confers upon the latter the authority to manage and control it during the existence of the marriage, and the power to sell it for the benefit of the community, but not, as we have seen, so as to defraud the community of it. In the case at bar, then, the right of the respondent to share the property in question, if it be proven to be community property, is clear. It accrued to her, as having been acquired in part by her own efforts, before the decree of divorce is rendered; that decree as rendered did not deprive her of it. The effect of the decree, acting upon her personal *status*, was to remove from her the disability theretofore, as we have said, almost total to sue concerning it, or to interfere in anywise in its control. Under the operation of that decree, too, the appellant, ceasing to be 'husband,' was no longer the head of the community, which had ceased to exist, and, as a consequence, he lost the exclusive control and the somewhat absolute power to dispose of the community property; thenceforth the party stood upon equal ground in that respect, and neither could wholly exclude the other from a participation in the property and its present disposition."

THIRD. *The section in question should not be construed as a general statute regulating the right of the husband and wife in the lands of each other generally and in any event, but as confined to those cases in which a decree of divorce is given under the Oregon Code of Civil Procedure and in the courts of the State.*

Upon this point the court below (Deady, J.) said:

"If, then, the decree of divorce in Barrett *v.* Barrett had been pronounced by a court of this State, in a proceeding under Title VII of its Code of Civil Procedure concerning 'suits to declare void or dissolve the marriage contract,' I should have no hesitancy in holding that this suit could be maintained, *unless the ruling in Bamford* v. *Bamford*, supra, *should prevent me.*

"But counsel for the plaintiff go further, as they must to maintain this bill, and contend that the right conferred by said section 495 on the prevailing party in the lands of the other is given to such party not only by the mere operation of the statute, and as a result of the decree and not by it, but in all cases cases of divorce, whether obtained in the courts of this State under its code of procedure or elsewhere; that the declaration in said section 495, 'whenever a marriage shall be declared void or dissolved, the party at whose prayer such decree shall be made, shall, in all cases, be entitled to the undivided one-third part * * * of the whole of the real estate owned by the other at the time of such decree,' is a general rule of universal application, like the provision in the statute of descents declaring that whenever any person shall die intestate and seized of real property, it shall descend to certain persons; or that of dower, which declares that the widow of every deceased person shall be entitled to dower in the inheritance of her husband; and cite Harding et ux. *v.* Alden, 9 Me., 140; De Godey *v.* Godey, 39 Cal., 161; and Whetstone *v.* Coffee, 48 Tex., 269.

"In Texas and California the civil law is so far in force that property acquired during the marriage, otherwise than by gift, devise, or descent, is common property—that is, it belongs to the matrimonial community, the husband and wife, equally, subject to the right of management on the part of the husband during coverture.

"The cases cited from these States only decide that when a decree of divorce is declared, and no disposition is made of the community property, the wife may assert her right to her interest in it in another suit before another court of the same State; and this although the statute of the latter State provided that in case of the dissolution of the marriage by the decree of the court, 'the common property shall be equally divided between the parties, and the court granting the decree shall make such order for the division of the common property.' But the question whether a decree of divorce obtained in another State—a foreign decree—comes within the operation of this section 495 so as to affect the title to lands in this State, these cases do not decide.

"The case in 9 Maine goes farther, and holds that under the law of that State, which provided generally that, when a divorce was adjudged for the adultery of the husband, the wife should be entitled to dower the same as if he were dead; and that a wife divorced in Rhode Island for the adultery of the husband committed in North Carolina was entitled to dower in his lands in Maine. The contest in the case was principally as to the validity of the Rhode Island divorce, and assuming that to have been valid, her right to dower was allowed without much consideration, the court being apparently controlled by the fact that the provision was general, 'and not limited to divorces decreed within the State.'

"And so the question of what was the legislative intent in the case of the Oregan statute must be determined mainly upon its own language and circumstances. In this connection weight must be given to the fact that said section 495 occurs in a code of procedure, and in that division of it which authorizes and regulates the granting of divorces in and by the courts of the State only, and not in a general statute defining or prescribing the rights of husband and wife, as such, in the lands or property of each other.

"Although, then, the statute does say that the prevailing party shall 'be entitled' 'in all cases' to a third of the other's land, yet the question arises, in what 'all cases'? Is it all the cases of divorce brought and determined under this code in the courts of Oregon and for the causes therein prescribed and allowed, or does the phrase include all the cases decided under any code in any country and

for any cause? In my judgment the statute only comprehends all the cases provided for in it and which may be said to arise, or at least be determined under it, and in the courts whose procedure is regulated by it. By the code (section 266), a judgment 'in any action' is authorized to be docketed, whereupon it becomes a lien upon the property of the judgment debtor in the county. The phrase 'any action' is quite as comprehensive as all actions. But can it be supposed for a moment that, under the circumstances, it includes a judgment given in any other State or country, or that any judgment was in the contemplation of the legislature, other than those authorized and provided for in the code in which the provision occurs?

"It may be admitted that the legislature has the power to provide that a decree of divorce, pronounced in the courts of another State, shall have the same effect upon the real property of the parties in this State as if given here, or that a judgment given in a foreign forum might be docketed here with the same effect as if given in the courts of the State.

"But it is not to be inferred that the legislature intended to make any such extraordinary provisions, from the bare use of language which is fairly satisfied when confined to domestic decrees and judgments, and only occurs in a code of procedure made to regulate judicial proceedings in the courts of the State. The results which would follow from allowing a decree of divorce in another State to have the same effect upon the property of either within this State as if given here are sufficiently serious to prevent such a conclusion, unless the statute was plain and peremptory to that effect.

"Divorces may be and are allowed in other States and countries for causes and under circumstances not allowed here, and contrary to the public policy and morals of the State. But if section 495 is taken absolutely and construed to include all cases of a decree for divorce, given as well without the State as within it, then such divorces, although granted contrary to the laws and policy of this State, would nevertheless be allowed an extraterritorial force and effect within it, and often, as in this case, against the property of its own citizens.

"Aid is sought to be given to the claim of the plaintiff by invoking the rule prescribed in article IV of the Na-

tional Constitution and the act of Congress passed in pursuance thereof, of May 26, 1790, (1 Stat., 122,) which in effect declares that the judgments of each State shall have the same credit and effect in every other State that they have in the State where they were given.

"But it is admitted that the decree of the California court is valid and effectual here as a decree of divorce, and that is all the effect it has in that State. The law of California, unlike that of this State, does not provide that a decree of divorce shall work a transfer or forfeiture of one-third of the real property of the one party to the other, and if it did it could have no extraterritorial effect, but would be confined in its operation to the property of the parties within that State.

"The plaintiff's decree of divorce, although valid and effectual, as such can have no operation or effect upon real property in this State, except with its consent declared in its laws."

A question similar in all respects to the question decided by the court below, viz., that a decree of divorce obtained in another State—a foreign decree—did not come within the operation of the said section 495 of the Oregon Code of Civil Procedure, was decided by the Supreme Court of Ohio in Mansfield *v.* McIntire and another, 10 Ohio, 27. In that case it was held that the following provision in the "Act concerning divorce and alimony," to wit, "that when the cause of divorce shall arise from the aggression of the wife, she shall be barred of her right of dower, whether there be issue or not," applied only to divorces decreed by the courts of that State. The reasoning of the court is entirely applicable to the case at bar.

The opinion of the court was delivered by Justice Hitchcock, who said:

"In the 6th section of the 'Act concerning divorce and alimony,' it is provided 'that when the cause of divorce shall arise from the aggression of the wife, she shall be barred of her right of dower, whether there be issue or not.' But does this apply to divorces generally, or to those

decreed by our own courts in pursuance of this statute? A very slight examination of the statute will be sufficient to convince any one that it applies only to divorces decreed in our own courts. If the divorce is on account of the aggression of the husband, the wife is restored to all her real estate, and is to be allowed out of the real and personal estate of her husband such share as the court shall deem reasonable, having regard to the personal property that came to the husband by the marriage. But if the divorce shall arise from the aggression of the wife, the court may order to her restoration of the whole or a part of the lands, tenements, and hereditaments, and also such share of the husband's personal property as may appear reasonable, all circumstances considered. In the latter case she is barred of the right of dower in her husband's lands; in the former she is not. If there are children of the marriage who are infants, the court are authorized to direct that they be committed to the guardianship of the mother, or remain with the father, as shall seem most expedient. In fine, the court are authorized to make such disposition of the property, and also of the children, as shall do perfect justice between the parties. Now, this cannot be done by a court in another State, certainly not under the provisions of our law, and therefore it could not have been the intention of the Legislature to declare the effect of any other decrees than those pronounced by our own courts."

The reasons given by the Supreme Court of Ohio for holding that the Ohio statute referred to applied only to divorces decreed by the courts of that State, applied to the Oregon statute, will sustain both propositions for which I contend.

Section 495 of the Oregon code expressly refers to section 497, which is as follows:

"SEC. 497. Whenever a marriage shall be declared void or dissolved, the court shall have power to further decree as follows:

"(1.) For the future care and custody of the minor children of the marriage, as it may deem just and proper, having due regard to the age and sex of such children, and,

unless otherwise manifestly improper, giving the preference to the party not in fault.

"(2.) For the recovery off the party in fault and not allowed the care and custody of such children, such an amount of money, in gross or in instalments, as may be just and proper for such party to contribute toward the nurture and education thereof.

"(3.) For the recovery off the party in fault, such an amount of money, in gross or in instalments, as may be just or proper for such party to contribute to the maintenance of the other.

"(4.) For the delivery to the wife, when she is not the party in fault, of her personal property in possession or control of the husband at the time of giving the decree.

"(5.) For the appointment of one or more trustees to collect, receive, expend, manage or invest in such manner as the court shall direct, any sum of money decreed for the maintenance of the wife or the nurture or education of the minor children committed to her care and custody.

"(6.) To change the name of the wife when she is not a party in fault."

While by section 495 it is made the duty of the court, in cases where a marriage shall be declared void or dissolved, to decree to the party at whose prayer such decree shall be made the undivided one-third part in fee of the real estate owned by the other at the time of the decree, in addition to the decree for maintenance provided for in section 497, the amount of money to be decreed to the prevailing party as a contribution to his or her maintenance, and the amount decreed against the party in fault and not given the custody of the children, as a contribution to their nurture and education, should certainly be determined, to some extent, by the amount, character, and condition of the real and personal property of the parties.

To illustrate: The amount of money which ought to be decreed against the party in fault ought not to be as great in a case where all the property of such party is real estate as in a case where but a small proportion of the property

of the party in fault is in real estate and the bulk thereof in money.

To be enabled to act intelligently, and to make a just decree in such a case as to the property rights of the parties, the court ought to be informed, by appropriate allegations and competent testimony, as to the amount, character, and condition of the real and personal property of the parties.

It seems reasonable, therefore, that the intention of the Legislature was not to give by the statute in question, to the successful party, upon a dissolution of the marriage contract without the judgment or decree of a court, one-third of the real estate of the other party; but that the intention was to entitle the prevailing party in such a case to a decree for the one-third of the real estate of the other party in connection with the decree of an Oregon court dissolving a marriage contract or declaring it void, and in connection with the further decree for maintenance and for other relief provided for in section 497.

The case of Barrett *v.* Barrett, 5 Or., 411, cited by counsel for appellant to show that a decree of divorce rendered in one State having jurisdiction will be given full effect in another State, while not a decision upon the point under discussion, shows nevertheless that the Supreme Court of Oregon must have considered in that case that the decree of divorce rendered in California did not fall within the purview of the Oregon statute and entitle the plaintiff in that suit to the one-third of the property in controversy. The facts, as they appear in the report of the case, are, in brief, that the appellant in the California suit obtained with her decree of divorce rendered April 18, 1870, a decree that the defendant in that suit, Charles Barrett, should pay $5,504.30 in gold coin for alimony and counsel fees, and the additional sum of $125 per month alimony so long as she should remain single; that on the 8th of December, 1870, she brought an action in

a court of Oregon on this decree, and on the 18th of February, 1871, recovered judgment against said Barrett in the sum of $5,921.30 gold coin, being for the original amount decreed for alimony and interest; that execution upon this judgment was issued and returned unsatisfied; that at the commencement of her suit for divorce said Barrett was the owner of lots 7 and 8 in block 63 in Portland, Oregon, (*the identical property in controversy in this suit,*) and had, prior to the decree, conveyed it to Xariffa J. Failing, then Xariffa Jane Barrett, his daughter, for the purpose of defrauding plaintiff of her demand.

The object of the suit was to set aside the conveyance and subject the property to the payment of her judgment. The court held her entitled to attack the conveyance; found that the property at the time it was conveyed to Xariffa Jane was of the value of $4,500; that the consideration paid for it by her was $2,485; and decreed the plaintiff to have a lien upon the property for the difference between its value and the consideration so paid, to wit, for the sum of $2,015, and ten per cent. interest thereon, from the 18th day of February, 1881, to the time when her judgment was obtained in Oregon. The decree is totally inconsistent with the theory that the appellant had acquired by virtue of the statute in question the undivided one-third of this property in fee-simple at the time of obtaining her decree of divorce, and the case presents unanswerable reasons why the statute in question should be limited not only to divorces granted by Oregon courts, but also to cases where the court, in connection with the decree for divorce and alimony, upon allegations and proofs, decrees to the prevailing party the interest in the real property of the other, which such prevailing party is entitled to under the statute.

The case of Gould *v.* Crow, 57 Mo., 200, is cited by appellant's counsel as in point, but it is not. That case was an action for dower in a lot in the town of Union, Mo.

A general statute of the State upon the subject of dower (Sec. 14 of Chap. 47, Wagner's Statute, p. 541,) provided:

"SEC. 14. If any woman be divorced from her husband for the fault or misconduct of the husband, she shall not thereby lose her dower; but if the husband be divorced from the wife for her fault, she shall not be endowed."

The lot in question was held by a purchaser from the plaintiff's former husband. The wife did not join in the conveyance. The plaintiff and one Robert Jeffries were married in Missouri; afterwards he obtained a divorce from her in the State of Indiana. The court, opinion by Adams, Judge, held that the divorce in Indiana was a valid one, and said:

"The marriage status being acted upon and dissolved by the decree, that relation became severed, and continues so in all other States and Territories, and property rights dependent alone upon its continued existence must cease, not only in the State where the decree is rendered, but in all other dominions. After such dissolution neither party can claim rights dependent on its continued existence. * * *

"By the statute of Missouri, if the husband be divorced for the fault of the wife, her right to claim dower in his lands ceased from the time the marriage status is severed.

"The section of the law referred to reads as follows:

* * * * * *

"'This section applies to all divorces, whether obtained in this or in any other State.'"

The power of the legislative assembly of Missouri to provide by a general statute intended to be a rule of property cannot be questioned.

But it does not follow that because the Missouri statute applied to all divorces, whether obtained in that or any other State, the Oregon statute was intended to have the same general application.

The remaining case relied upon by the appellant's counsel is the case of Harding *v.* Alden, 9 Maine, 140.

As was said, in substance, by the court below concerning this case, the contest was principally as to the validity of the Rhode Island divorce; assuming that to have been valid, the demandant's right to dower was allowed without much consideration, the court being apparently controlled by the fact that the provision was general, and not limited to divorces decreed within the State.

The statute under which the plaintiff claimed dower in that case was the following clause of section 5, chapter 71, statutes of 1821:

"And when the divorce shall be for the cause of adultery committed by the husband; in addition to her dower to be assigned to her in the lands of her husband in the same manner as if such husband was naturally dead," &c.

The point was neither raised by counsel nor discussed by the court as to whether this statute was general, or limited to divorces decreed within the State. On the contrary, in the statement of the case the following occurs:

"It was conceded that the demandants were entitled to judgment if the wife had been legally divorced from her former husband, to whom she was married May 24, 1809, in Massachusetts, where they then dwelt."

The attention of the court was directed mainly to the question of the validity of the Rhode Island divorce; and the question of her right to dower under the statute, the divorce being valid, being conceded by counsel, was summarily disposed of by the court, as follows:

"If, then, the divorce decreed in Rhode Island is valid here, the remaining question is, whether the wife was thereupon entitled to draw in any estate of inheritance of which the husband was seized during coverture. The statute allows it in the lands of the husband where divorce is decreed for the cause of adultery committed by the husband, to be assigned in the same manner as if he were dead.

"The language is general, and is not limited to divorce decreed within the State."